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IN THE
Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN P. KING,

Respondent.

On Writ Of Certiorari To The United States
Court Of Claims

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion and order of the United States Court of Claims (A. 12-40) are reported in 182 Ct.Cl. 631, 390 F.2d 894.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitioner's Brief.

QUESTION PRESENTED

The question presented in petitioner's Brief (Br. 2) is:
Whether the Declaratory Judgment Act, 28 U.S.C. § 2201,

grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

The matter which the decision of the Court of Claims resolved was that the Declaratory Judgment Act is applicable to the Court of Claims, and specifically, to respondent's case. Therefore, it is respondent's view that the question before the Court is:

Whether the Declaratory Judgment Act, 28 U.S.C. § 2201, applies to the United States Court of Claims.

STATUTES INVOLVED

28 U.S.C. § 451 (Definitions) (Act of June 25, 1948, Ch. 646, 62 Stat. 869, 907) provides, in pertinent part:

§ 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court and any court created by Act of Congress the Judges of which are entitled to hold office during good behavior.

The Tucker Act, 28 U.S.C. § 1491, provides in pertinent part:

§ 1491. Claims against United States generally * * *

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part:

§ 2201. Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

The undisputed facts which the respondent deems to be pertinent to the question of the applicability of the Declaratory Judgment Act to the United States Court of Claims as shown by the petition (A. 3-7) and answer (A. 7-8) filed in the United States Court of Claims, are as follows:

- (1) On May 14, 1959 an Army Physical Evaluation Board found respondent unfit for active duty by reason of physical disability.¹ The Physical Evaluation Board recommended his placement on the Temporary Disability Retired List² and reevaluation as provided by law (Para. 4, A. 4-5). On June 18, 1959 the Army Physical Review Council reviewed the Physical Evaluation Board action and found respondent fit for duty, i.e. not disabled (A. 4, Para. 5). On July 7, 1959 respondent rebutted the Physical Review Council findings (A. 4, Para. 6). On July 21, 1959 the Army Physical Disability

¹ The Physical Evaluation Board was convened under the provisions of 10 U.S.C. § 1201 *et seq.* and implementing Army regulations, i.e. Army Regulations 635-40A, dated August 13, 1957 and Army Regulations 635-40B, dated August 13, 1957.

² See: 10 U.S.C. § 1202.

Appeal Board concurred with the Physical Review Council and, as a result, respondent was retired for longevity on July 31, 1959 (A. 4, Para. 7) under the provisions of 10 U.S.C. § 3911, § 3991 rather than for physical disability under 10 U.S.C. § 1201 *et seq.*

- (2) On August 25, 1959 respondent filed an application for correction of military records with the Army Board for Correction of Military Records requesting his records be corrected to show him retired by reason of physical disability (A. 4, 7, Para. 8).³ The Army Board for Correction of Military Records held a hearing on January 25, 1961 (A. 5, Para. 14). Thereafter, the application was formally denied by the Under Secretary of the Army on May 19, 1961 (A. 6, Para. 16).

Having accrued over thirty years of service for pay purposes, the gross amount of respondent's longevity retirement pay is equal to 75% of the monthly basic pay of a Colonel. Were plaintiff retired by reason of physical disability (either pursuant to the disability evaluation proceedings conducted prior to retirement or pursuant to a retroactive correction of his records⁴) the maximum dis-

³ The application was filed under the provisions of 10 U.S.C. § 1552 and Army Regulations 15-185, dated July 18, 1955, the Army's implementing regulation.

⁴ Had the application under 10 U.S.C. § 1552 been granted respondent's records would have been retroactively corrected to show his retirement by reason of physical disability on July 31, 1959, which was the recommendation of the dissenting voting member of the Army Board for Correction of Military Records (A. 11). If respondent's records had been corrected to show his retirement by reason of physical disability on July 31, 1959, by virtue of such a retroactive correction of his records 10 U.S.C. § 1552(c) provided authority for the Army's payment "from applicable current appropriations" of all physical disability retired pay due from July 31, 1959 as a result of the correction, the amount of which, coincidentally, would have equaled the amount of taxes withheld from his longevity retired pay. In *Darby v. United States*, 146 Ct.Cl. 211, 173 F. Supp. 619 (1959), where an officer's records were corrected under 10 U.S.C. § 1552 to show his promotions to higher ranks at

ability retirement pay rate (i.e. 75%) would have been, and would be, the same as that for longevity. The action of the Secretary of the Army (acting by and through the Physical Evaluation Board, Army Physical Review Council and Army Physical Disability Appeal Board prior to July 31, 1959, and the Under Secretary and Army Board for Correction of Military Records subsequent to July 31, 1959) denied respondent that portion of his retired pay which if retired for physical disability is automatically exempt from income taxation under 26 U.S.C. § 104(a) (4) (A. 13).

The respondent brought this action in the United States Court of Claims, alleging, in pertinent part, that the action of the Secretary of the Army in failing to grant respondent physical disability retirement pay was arbitrary, capricious, not supported by the evidence and contrary to law and regulation and that the failure of the Secretary, acting through the Army Board for Correction of Military Records, to grant respondent disability retirement was arbitrary, capricious, and contrary to the evidence and law. In his petition respondent prayed for a judgment against petitioner "for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to [respondent]", the amount to be determined under Rule 47(c) and for such other and further relief as "might be deemed just and proper". (A. 6-7).

The petitioner's first affirmative defense was that respondent's claim was "basically a claim for a refund of taxes" and, therefore, barred by the respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service under 26 U.S.C. § 7422(a) (A.

earlier dates (by adjustments in his dates of rank), it was held that plaintiff was entitled to pay and allowances from the dates of his corrected dates of rank and that 10 U.S.C. § 1552 permitted the Department of the Army to pay plaintiff in accordance with his corrected records (146 Ct.Cl. at 217).

6-7). In acting on the petitioner's motion to dismiss, the Court of Claims issued an order (A. 12) upholding, in effect, the Government's first affirmative defense and suggested that the sole relief which the respondent could then possibly have from the court would be a declaration of his right to be retired for physical disability and to have his records changed accordingly. Because of the history of the point in the Court of Claims (Part I, decision below, A. 14-21) and on account of the petitioner's explicit challenge (in its motion to dismiss) to the Court of Claims' authority to give declaratory relief, the Court of Claims invited reconsideration (A. 14) of the applicability of the Declaratory Judgment Act to "this court and this case" (A. 12). Briefs were filed and the point argued. Thereafter, the Court of Claims rendered its opinion of February 16, 1968 (A. 12-40). In its opinion the Court of Claims accepted the respondent's contention (A. 39) that this was not an action "with respect to federal taxes"; that the "determination which the [respondent] requests is not a determination of his tax liability"; that the interpretation and application of 26 U.S.C. § 104(a)(4) is "totally irrelevant to the questions [respondent] seeks to place before [the Court of Claims]" noting (A. 40 n.42) there was "no question that § 104(a)(4) of the Internal Revenue Code would exempt his retirement pay for income tax if he were held retired for disability"; that "the only questions he presents, or need present, relate to [the respondent's] retirement from the Army"; and that "[i]n the circumstances, [the respondent's] tax motives have absolutely no bearing on the application of the declaratory remedy" (A. 40).

The Court of Claims held that the Declaratory Judgment Act does apply to the Court of Claims and to this case (A. 39). In rendering its decision the Court of Claims overruled its decision in *Twin Cities Properties, Inc. v. United States*, 81 Ct.Cl. 655 (1935) (A. 38) wherein it was held that the Declaratory Judgment Act (48 Stat. 955, 1934) did not apply to the Court of Claims.

In determining that the Declaratory Judgment Act applied to the Court of Claims, the Court stated, in pertinent part:

"All we hold today is that claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. That use of the Declaratory Judgment Act will surely not extend our jurisdiction or contravene 28 U.S.C. § 1491, *supra*. Whether there are other classes (i.e., non-money-related cases) in which a declaratory proceeding can validly be offered by this court we leave open for further development. At the least, plaintiff's category falls this side of the jurisdictional boundary." (A. 32).

The Court of Claims denied the petitioner's motion to dismiss and granted the respondent leave to amend his petition (A. 40) "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed". The case was "then to be returned to the trial commissioner for further proceedings". The petition was amended March 8, 1968 (A. 41-42). The petitioner filed a motion for reconsideration on March 15, 1968 and an answer to the amended petition on March 29, 1968 (A. 43). The motion for reconsideration was denied without opinion on June 14, 1968. The petitioner then filed its petition.

SUMMARY OF ARGUMENT

I.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that in a case of actual controversy within its jurisdiction, except with respect to federal taxes, "any court

of the United States" may declare the rights and other legal relations of any interested party seeking such a declaration whether or not further relief is or could be sought. By definition as set forth in 28 U.S.C. § 451, the United States Court of Claims is a "court of the United States". As such, it is clear that the Declaratory Judgment Act is applicable to proceedings within the subject matter jurisdiction of the Court of Claims as set forth in 28 U.S.C. § 1491 such as in the respondent's case which is a claim for disability retired pay involving both Acts of Congress (i.e. 10 U.S.C. § 1201, et seq. and 10 U.S.C. § 1552) and regulations of an executive department (i.e. Army Regulations 635-40A and 635-40B). The Declaratory Judgment Act contains no prohibition or exception to its applicability to proceedings otherwise within the jurisdiction of the United States Court of Claims. There appears to be nothing in the legislative history of the Declaratory Judgment Act to show an intent to exclude the Court of Claims, as a "court of the United States", from being authorized to utilize declaratory procedures provided for in the Declaratory Judgment Act. In this regard, the legislative history indicates that the decisions of the Court of Claims have been viewed as being essentially declaratory in nature since they provide for no execution. The petitioner itself has acknowledged that: "[The Court of Claims] may declare whether a claimant has ^{the} right to collect money from the United States," "[b]ut may do no more—it may not even execute on it" (Br. 16). Moreover, the petitioner itself has instituted proceedings for declaratory relief under the provisions of 28 U.S.C. § 2201.

II.

Since the operation of the Declaratory Judgment Act is procedural only, the waiver of sovereign immunity of the United States under the Tucker Act, 28 U.S.C. § 1491, permits application of the Declaratory Judgment Act to proceedings in the United States Court of Claims that fall within the subject matter jurisdiction of the Court of

Claims. Use of the Declaratory Judgment Act does not enlarge the subject matter jurisdiction of the Court of Claims. So long as the subject matter of the litigation falls within the purview of the Tucker Act the Court of Claims is authorized to employ the procedures provided for in the Declaratory Judgment Act.

III.

There is nothing contained in the provisions of the Tucker Act limiting the Court of Claims to claims for the "present" recovery of money from the United States. To maintain a suit in the Court of Claims there must be a "claim" which must be "against the United States" founded, in pertinent part, upon either the Constitution, an Act of Congress, or any regulation of an executive department but it need not entail a claim wherein the claimant immediately seeks a money judgment or one that is solely for money due and owing at the time the claim is made. The power of the Court of Claims to avail itself of the procedural remedies provided for in the Declaratory Judgment Act does not terminate with a determination by that forum that there is no present right to money being immediately recovered from the United States. Petitioner has presented no authority which supports its contention that the Court of Claims "must" dismiss a case once it finds that a claimant does not have a "present" right to receive money from the United States.

IV.

The decision below is consistent with the historical functions and limitations upon the jurisdiction of the Court of Claims. Petitioner itself has acknowledged that the Congress, in adopting the Declaratory Judgment Act, drew an analogy to the procedures of the Court of Claims, stating that the decisions of the Court of Claims are essentially declaratory in nature. The use of declaratory procedures by the Court of Claims is nothing more than a

procedural step towards determining whether monies are due or will be due a claimant from the United States. As in this case, in order for the Court of Claims to determine whether respondent does have a meritorious claim, i.e. a right to collect money from the United States, it is incumbent upon the court to determine and to "declare" whether respondent should have been retired by reason of physical disability and, secondly, whether his records should have been corrected to show that he was retired by reason of physical disability in 1959. Entry of a declaratory judgment on these issues in relation to respondent's claim would not be inconsistent with the court's functions or limitations on its jurisdiction. To the contrary, it would be compatible with its practice under its Rule 47(c).

The decision below does not connote an assertion of power on the part of the Court of Claims to grant specific equitable relief. The granting of declaratory relief, such as might be accorded respondent in connection with his claim for disability retired pay, is merely a statement of rights or a recognition of the claimant's rights. A declaratory judgment should have the same *res judicata* effect as between the respondent and the United States, just as much as a money judgment. A declaratory judgment would not have the same effect as a mandatory injunction as petitioner contends. The granting of declaratory relief will not constitute a remand, as claimed by petitioner. Any administrative corrective action or relief sought at the administrative level subsequent to the rendering of a declaratory judgment, as in the case of a money judgment, would have to be initiated by a claimant, and not by the agency concerned acting *sua sponte*. As shown by the decision below, and earlier litigation in the Court of Claims, the Court of Claims is keenly aware of the exception in the Declaratory Judgment Act of cases "with respect to Federal taxes" as being a category of cases expressly excluded from the Declaratory Judgment Act. The decision of the Court of Claims clearly shows that the subject matter of respondent's case falls within the subject matter jurisdic-

tion of the Court of Claims defined in the Tucker Act and that it would be appropriate for the Court of Claims to grant respondent declaratory relief.

V.

The decision below is consistent with the purposes of the Declaratory Judgment Act. As a "court of the United States" it is consistent with the express purpose of the Declaratory Judgment Act for the Court of Claims "to declare the rights and other legal relations" of both claimants and the United States in cases of "actual controversy" within its jurisdiction. The authority of the Court of Claims to declare the rights of a claimant and/or the United States with respect to an asserted "claim against the United States" within its jurisdiction, whether or not in the ultimate it is determined that a claimant may or may not be entitled to any monies due in relation to the asserted claim, is manifestly in accord with the intent of the Declaratory Judgment Act.

Petitioner's view that the Declaratory Judgment Act was intended solely to settle "private" controversies is founded on a comment made in the legislative history of the 1935 amendment regarding the exception "with respect to Federal taxes" and not in connection with the enactment of the Declaratory Judgment Act of 1934. Declaratory relief has been deemed proper in areas of Government litigation under federal statutes comparable to the Tucker Act.

The petitioner's view that declaratory relief is not intended to settle "public" controversies is inconsistent with its own actions wherein it has instituted proceedings seeking declaratory relief. Contrary to petitioner's assertion, respondent's claim is not against government officials or federal officials. While the adjudication of a claim against the United States by the Court of Claims necessitates judicial inquiry into the actions of cognizant Government officials against the background of governing laws and regulations, the money relief that may be accorded a

claimant, such as respondent, is obtainable not from the Government officials but solely from the United States.

As a "court of the United States", which the Court has viewed as having "greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental actions" (*Glidden Co. v. Zdanok*, 370 U.S. 530, 550-557 (1962)), the granting of declaratory relief by the Court of Claims within the jurisdictional bounds of 28 U.S.C. § 1491 is compatible and consistent with the purposes of the Declaratory Judgment Act.

For these reasons, it is submitted that the Court should affirm the decision below.

ARGUMENT

I.

The Declaratory Judgment Act Is Applicable To The United States Court Of Claims

The Declaratory Judgment Act as enacted in 1934 (48 Stat. 955) authorized "the Courts of the United States" to grant declaratory relief. In 1935 the Declaratory Judgment Act was amended to provide an exception for controversies "with respect to Federal taxes". (49 Stat. 1014, 1027). Since the time of the revision and codification of the Judicial Code in 1948 the Declaratory Judgment Act, 28 U.S.C. § 2201, provides that "any court of the United States", in an actual controversy within its jurisdiction, except with respect to Federal taxes, may declare the rights and legal relations of any interested party seeking such a declaration whether or not further relief is or could be sought (emphasis supplied). By definition as set forth in 28 U.S.C. § 451 (1948), the United States Court of Claims is a "court of the United States".

By reason of the very clear language of 28 U.S.C. § 2201 and 28 U.S.C. § 451, it is clear that the Declara-

* In a similar vein, within the definitions contained in 28 U.S.C. § 451 the term "judge of the United States" includes "judges . . . of the Court of Claims."

tory Judgment Act is applicable to proceedings within the subject matter jurisdiction of the United States Court of Claims as stated in that forum's general jurisdictional statute, now 28 U.S.C. § 1491 (1964), such as claims against the United States founded upon the Constitution, an Act of Congress, or any regulation of an executive department. In this regard, it is particularly noteworthy that in its brief the petitioner did not cite or make reference to the provision of 28 U.S.C. § 451. Neither has the petitioner addressed itself to, or reconciled, the interrelationship of 28 U.S.C. § 451 and 28 U.S.C. § 2201 and, specifically, as they pertain to the resolution of the question of the applicability of the Declaratory Judgment Act to the United States Court of Claims.

A consideration which lends support to the position that the Declaratory Judgment Act is applicable to the Court of Claims is the fact that the provisions of the Declaratory Judgment Act contain no prohibition or exception, express or implied, as to its applicability to proceedings otherwise within the subject matter jurisdiction of the United States Court of Claims. Additionally, there appears to be nothing in the legislative history of the Declaratory Judgment Act, which was comprehensively reviewed in the decision below (A. 34-38), to show a legislative intent by the Congress to exclude the Court of Claims as a "court of the United States" from being authorized to utilize declaratory procedures provided for in the Declaratory Judgment Act. In this regard, the legislative history indicates that the decisions of the Court of Claims have been viewed as being essentially declaratory in nature since they provide for no execution.⁶ These views are entirely in consonance

⁶ Support for the view that the Declaratory Judgment Act, even as originally enacted in 1934, has always applied to the Court of Claims is revealed in the passage of the treatise of Professor Edwin Borchard [described by the court below as the "chief extra-Congressional sponsor of the federal act" (A. 37)] on declaratory judgments which stated: "The introduction of the federal Declaratory Judgment Act has raised the question whether the position of the United States Government as a defendant has been modified and whether

with those of the Court as expressed in 1933, a year prior to the enactment of the initial Declaratory Judgment Act, in *Nashville C. & St.L. Ry. v. Wallace*, 288 U.S. 249, 263-264 (1933) wherein the Court stated: "While the ordinary course of judicial procedure results in a judgment requiring an award of process or execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function", and cited among others, the Court's review of judgments of the Court of Claims "although no process issues against the United States". (288 U.S. at 264). Consequently, the language of the 1948 Code revision providing that "any court of the United States" may grant declaratory relief, if not the language of the 1934 Act (i.e. "the courts of the United States"), should be deemed to specifically and automatically include the United States Court of Claims. The petitioner itself has acknowledged that: "[The Court of Claims] may declare whether a claimant has the right to collect money from the United States". (Br. 16).

A further and most significant indication of the applicability of the Declaratory Judgment Act to the United States Court of Claims is shown by the unalterable fact that the United States itself has instituted proceedings

declaratory judgments could not be obtained against the United States under circumstances outside the terms of the Tucker Act and other statutory authority accepting liability and subjection to suit. The answer is clearly in the negative. Since all judgments against the United States within the permitted limits, are declaratory in effect, a petition would doubtless not be dismissed if it sought a declaratory judgment in such cases." *Borchard, Declaratory Judgments*, Page 373, (2nd Ed., 1941). Similarly, in the final Senate Report on the 1934 Act it was stated, in pertinent part, that: "The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution." Senate Report No. 1005, 73d Congress, 2nd Session, 4-5 (1934). In this regard, the petitioner stated: "To be sure, in adopting the Declaratory Judgment Act, the Congress drew an analogy to the Court of Claims' procedure, stating that the 'decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution'." (Br. 11).

under the Declaratory Judgment Act, 28 U.S.C. § 2201. As recently as September 27, 1968 the petitioner here, in the case of *United States v. Reynolds Metals Company* (Civil Action No. 2412-68), filed a complaint in the United States District Court for the District of Columbia seeking a declaratory judgment under the provisions of the Declaratory Judgment Act (28 U.S.C. § 2201) in litigation involving a claim of \$7,898,479.00.⁷ In *Teplitsky v. Bureau of Compensation U. S. Department of Labor and United States of America* (USDC, SD, NY, 288 F.Supp. 310, decided March 29, 1968; modified and, as modified,⁸ affirmed 398 F.2d 820 (C.A. 2), decided June 21, 1968) declaratory relief was obtained by the petitioner under the provisions of 28 U.S.C. § 2201. In *Raydist Navigation Corp. v. United States*, 144 F.Supp. 503 (E.D. Va., 1956) it was held that a court having Tucker Act jurisdiction in an action against the Government may grant a declaratory judgment. Similarly, declaratory relief has also been held proper in comparable Government litigation under: (a) the Suits in Admiralty Act (46 U.S.C. § 741 et seq.)⁹; (b) the National Service Life Insurance Act (38 U.S.C. § 801 et seq.)¹⁰; (c) the Trading With The Enemy Act (50 U.S.C. App. § 1 et seq.)¹¹; and (d) the Federal Tort

⁷ By praecipe filed October 25, 1968 the action was dismissed without prejudice in view of the institution of litigation "on the same claim" by Reynolds Metals Company in the United States Court of Claims.

⁸ The modification related to the election of compensation benefits available to the appellant.

⁹ *Luckenbach Steamship Co. v. United States*, 312 F.2d 545 (C.A. 2, 1963); *American-Foreign Steamship Corp. v. United States*, 291 F.2d 598, 604 (C.A. 2), cert. denied, 368 U.S. 895 (1961); *American President Lines v. United States*, 162 F.Supp. 732, 739 (D.Del. 1958), affirmed per curiam; 265 F.2d 552 (C.A.3, 1959).

¹⁰ *Unger v. United States*, 79 F.Supp. 281, 283-284 (E.D. Ill., 1948)

¹¹ *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (C.A.9, 1954)

Claims Act (28 U.S.C. § 1346(b)).¹² The petitioner did not cite or make reference to the cases falling within the aforementioned categories of litigation. With respect to the respondent's case, the Court of Claims held, for the reasons stated in Part IV of the decision below (A. 29-34, at A. 31), respondent's case "fits snugly into the traditional class of money claims against the Federal Government" (A. 39).

In the light of the foregoing points and authorities, it is urged that the Declaratory Judgment Act, 28 U.S.C. § 2201, is applicable to the United States Court of Claims.

II.

The Declaratory Judgment Act Is A Procedural Remedy And Does Not Involve Expansion Of Subject Matter Jurisdiction Of The United States Court Of Claims

It is well established that the "operation of the Declaratory Judgment Act is procedural only". *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). As the Court stated in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943): "The statutory authority to render declaratory judgments permits federal courts by a new form of procedure to exercise the jurisdiction to decide cases or controversies both at law and in equity, which the Judiciary Act has already conferred." In *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-672 (1950), the Court presented a definitive interpretation of what the Congress had done in enacting the Declaratory Judgment Act when it held that:

"Congress enlarged the range of remedies available in the federal courts but did not extend their juris-

¹² *Pennsylvania R.R. Co. v. United States*, 111 F.Supp. 80, 85-90 (D. N.J., 1953) wherein it was held that a declaratory judgment was available, even where no money damages are immediately claimed, at least as a "procedural step" toward obtaining damages.

diction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine them, 'jurisdiction' means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act." (339 U.S. at 671-672).

Since the operation of the Declaratory Judgment Act is procedural only, the waiver of sovereign immunity of the United States under the Tucker Act, 28 U.S.C. § 1491, clearly permits the application of the Declaratory Judgment Act to proceedings in the United States Court of Claims that fall within the subject matter jurisdiction of that forum. Utilization of the declaratory procedures or remedies provided for in the Declaratory Judgment Act does not enlarge or expand the subject matter jurisdiction of the Court of Claims. So long as the subject matter of the litigation falls within the purview of the Tucker Act the Court of Claims is authorized to employ the procedures provided for in the Declaratory Judgment Act.

At the outset of its argument petitioner has stated that the "resolution of this case requires analysis of the Declaratory Judgment Act and the Tucker Act, which are the only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims" (Br. 7). In consonance with the existing precedents, petitioner has acknowledged (Br. 8) that the operation of the Declaratory Judgment Act is procedural only. Specifically, petitioner has stated that the Declaratory Judgment Act "makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code" (Br. 9). Petitioner cites the Tucker Act (28 U.S.C. § 1346(a), § 1491) as an example of how the Congress "has always cast waivers of sovereign immunity in explicit and unmistakable terms" (Br. 7).

Despite the foregoing acknowledgements by the petitioner, the petitioner argues (Br. 8) that the Declaratory Judgment Act does not contain an "explicit waiver of sovereign immunity" making the provisions of the Declaratory Judgment Act applicable to the Court of Claims. In essence, the petitioner asserts that utilization of the declaratory procedures provided for in the Declaratory Judgment Act would be expanding the jurisdiction of the Court. It appears that the position taken by petitioner is wholly inconsistent with its own recitals especially in view of its acknowledgment that the Declaratory Judgment Act *is applicable* to cases "within the jurisdictional limits established by *other provisions of the Judicial Code*"—here the provisions of 28 U.S.C. § 1491 (Emphasis supplied). The apparent inconsistency of petitioner is also revealed by its own statement that: "[The Court of Claims] *may declare* whether a claimant has the right to collect money from the United States" (Br. 16) (Emphasis supplied). Obviously, any declaration would have to be founded upon the "kinds of issues which give right of entrance" to the Court of Claims such as those set forth in ^{THE} general jurisdictional statute of the Court of Claims, now 28 U.S.C. § 1491 (1964).

It is most significant that in connection with its entire argument (Br. 8-9) in relation to the necessity for an analysis of the Declaratory Judgment Act and the Tucker Act as the "only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims", the petitioner did not cite or discuss the waiver of sovereign immunity contained in 28 U.S.C. § 1491 as such provides, in petitioner's own words, the "other provisions of the Judicial Code" which makes the Declaratory Judgment Act applicable to the United States Court of Claims. Nowhere within the bounds of its argument did the petitioner address itself to the provisions of 28 U.S.C. § 1491 as the link to the application of the Declaratory Judgment Act to proceedings in the United States Court of Claims. Equally significant, with-

in the bounds of its argument (Br. 8-9) the petitioner did not discuss or reconcile the matter of the Declaratory Judgment Act being applicable to "any court of the United States" especially in the light of the fact that the United States Court of Claims is expressly included within the definition of "courts of the United States" as stated in 28 U.S.C. § 451 (1948).

The Declaratory Judgment Act, as shown above, is a procedural remedy that is available to "any court of the United States". Employment of the declaratory procedures provided for in the Declaratory Judgment Act does not involve an expansion of the subject matter jurisdiction of the Court of Claims. Therefore, it is clear that the provisions of the Declaratory Judgment Act are available to the United States Court of Claims to the extent that its procedures are applied "[i]n a case of actual controversy within its jurisdiction", namely, to the extent there has been a waiver of sovereign immunity as granted under the Tucker Act.

III.

The Court Of Claims Is Not Limited To Application Of The Declaratory Judgment Act Solely To Suits Involving Claims For The Present Recovery Of Money From The United States

The jurisdiction of the United States Court of Claims to adjudicate claims against the United States generally is founded on the part of the Tucker Act now codified in 28 U.S.C. § 1491 (1964) which provides, in pertinent part, as follows:

"The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The petitioner contends (Br. 9-16) the jurisdiction of the Court of Claims as provided for in the Tucker Act, 28 U.S.C. § 1491, is limited solely to the adjudication of claims for the "present" recovery of money from the United States; that the Court of Claims "must" dismiss a case once it finds the claimant does not have a "present right to receive money from the United States"; that a "declaration" by the Court of Claims relates solely to a "present right to payment from the United States"; and that "[b]ecause the Court of Claims' jurisdiction ends if it determines that there is no present right to money, its power to declare rights ends at the same point". The petitioner has presented no precedents or authority which support its contentions or "analysis".

There is nothing in the language of the Tucker Act which justifies it being construed or qualified in the manner suggested by the petitioner. The Tucker Act does not state that "any claim" brought under the provisions of that statute shall be solely for the "present" recovery of money. There is nothing in the language of the Tucker Act which states that "any claim" against the United States may only be for money owing at the time the claim is made. Similarly, the language of 28 U.S.C. § 1491 does not dictate that the Court of Claims "must" dismiss a suit once it determines the claimant does not have a "present right to receive money from the United States" or that its "declaration" will relate solely to a "present right to payment from the United States". Additionally, the authority of the Court of Claims to declare the rights of claimants is not at an end if it determines that there is "no present right to money".

The question of whether or not a claim against the United States is limited to the recovery of money presently due was accorded exhaustive consideration in the decision below (A. 30-31) in connection with the court's recital of the specific prerequisites for the "kinds of issues which give right of entrance" to the Court of Claims within the

framework of 28 U.S.C. § 1491. Specifically, the Court stated in pertinent part:

“Historically . . . the area with which we have dealt has been that of controversies with a money cast—cases tied in some way to a demand or call upon the Government for the payment of money to the claimant, either because his money (or property) was wrongfully taken by (or handed over to) the United States or because the United States owes or will owe him money on account of some contract or provision of law. See *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 605-07, 372 F.2d 1002, 1007-09 (1967); cf. *Ralston Steel Corp. v. United States*, 169 Ct.Cl. 119, 125, 340 F.2d 663, 667, cert. denied, 381 U.S. 950 (1965); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 167 Ct.Cl. 236, 244-45, 334 F.2d 622, 626-27 (1964), cert. denied, 379 U.S. 964 (1965). But for a suit to have such a money cast does not require (as we have pointed out)¹³ that the plaintiff immediately seek a money judgment from this court or even that he ever seek such a judgment. What it does mean is that the claimant, if he does

¹³ With respect to the question of the Court's practice under Court of Claims Rule 47(c) the Court of Claims stated: “Moreover, pursuant to Court of Claims Rule 47(c) ‘a trial may be limited to the issues of law and fact relating to the right of a party to recover, reserving the amount of recovery, if any, for further proceedings’ and ‘the judgment on the question of the right to recover shall be final.’ [Emphasis in original]. In a great number of cases utilizing Rule 47(c) we have, in effect, declared the liability of the defendant before it was determined whether there would be any money award at all” (Citing *Shdw v. United States*, 174 Ct.Cl. 899, 357 F.2d 949 (1966)). “Like a formal declaratory judgment, a decree of liability entered under the rule is a mere statement of rights, though it too may be (but not surely) the basis for the recovery, in the future, of money.” (Emphasis supplied). In this regard, the court went on to state: “In some instances, we have declared the claimant entitled, although in the very same opinion we have concluded that he could not recover any money; a recent example is *Everett v. United States*, 169 Ct.Cl. 11, 340 F.2d 352 (1965), where a federal employee who was held illegally discharged was at the same time barred from a money judgment because he could not prove that he was able to work during the period of his wrongful removal.” (A. 27-28).

not ask for a money judgment, pray for this court's help in order to be in a position to collect money from the United States, sometime in the future. Such an action has a money cast and is money-oriented—can, in other words, properly be called a 'money claim' or at least a 'money-related claim' against the Federal Government—in the realistic sense that the plaintiff's declaratory judgment, if he prevails, will lead to his being able to receive money from the Government, if he chooses, perhaps immediately after the judgment or perhaps at some future time. The claim for money may not be current or immediate but it is at least potential, and the action is therefore linked to the recovery of money from the Government." (A. 30) (Emphasis supplied)

From the foregoing it can readily be seen that both as a matter of traditional practice, and as a practical matter, the Court of Claims is not limited to the adjudication of claims against the United States involving solely a claim for the "present" recovery of money, nor "must" it dismiss a claim if it finds the claimant does not have a "present right to receive money from the United States", as asserted by the petitioner. The same would hold true in the application of the provisions of the Declaratory Judgment Act by the Court of Claims to proceedings falling within the confines of 28 U.S.C. § 1491.

In an attempt to find support for its "analysis" or argument that the jurisdiction of the Court of Claims is limited to claims for the "present" recovery of money from the United States petitioner cites *Glidden Co. v. Zdanok*, *supra* 370 U.S. at 557, quoting therefrom as follows: "From the beginning it has been given jurisdiction only to award damages * * *" (Br. 10). The full sentence cited from *Glidden v. Zdanok* stated: "From the beginning it has been given jurisdiction only to award damages, not specific relief." (Emphasis supplied). (Citing *United States v. Alire*, 73 U.S. (6 Wall.) 573 (1867) and *United States v. Jones*, 131 U.S. 1 (1889).) Both *United States*

v. *Alire*, *supra* and *United States v. Jones*, *supra* dealt with prayers for specific equitable relief relating to public lands.¹⁴ In *Glidden Co. v. Zdanok* the Court was addressing itself to the "money judgment" doctrine as distinguished from actions for specific coercive relief which, as originally decided in *United States v. Alire*, *supra*, and followed in *United States v. Jones*, *supra*, were deemed to go beyond the jurisdiction of the Court of Claims. In *Glidden Co. v. Zdanok* the Court did not hold that the jurisdiction of the Court of Claims was limited to cases solely involving a claim for the "present" recovery of money. Equally significant, in *Glidden Co. v. Zdanok* the Court did not address itself to the question of the applicability of the Declaratory Judgment Act, 28 U.S.C. § 2201, to the United States Court of Claims.

¹⁴ The judgment entered by the Court of Claims (and reversed by the Court) in *United States v. Alire* pertained to the claimant recovering from the government a military land warrant to be made out and delivered to the plaintiff "by the proper officer, and the decree to be certified and remitted to the Secretary of the Interior" (73 U.S. (6 Wall.) at 576). In *United States v. Alire* the Court stated (73 U.S. (6 Wall.) at 573) that under the 1855 and 1863 Acts establishing the Court of Claims (Act of February 24, 1855, Ch. 122, 10 Stat. 612; Act of March 3, 1863, Ch. 92, 12 Stat. 765) "the only judgments which the Court of Claims [was] authorized to render against the Government * * * [were] judgments for money found due from the government to the petitioner." (73 U.S. (6 Wall.) at 575) and that "although it was true that the subject matter over which jurisdiction is conferred, both in the acts of 1855 and of 1863, would admit of a much more extended cognizance of cases, yet it is quite clear that the limited power given to render a judgment necessarily restrains the general terms, and confines the subject-matter to cases in which the petitioner sets up a moneyed demand as due from the government." (73 U.S. (6 Wall.) at 575-576). In *United States v. Jones*, *supra*, the plaintiffs sought, under the Tucker Act provision granting concurrent jurisdiction to the district courts and then circuit courts, "equitable relief by specific performance, to compel the issue and delivery of a [timber] patent". 131 U.S. at 14. In *United States v. Jones* the Court held that the passage of the Tucker Act in 1887, Ch. 359, § 1, 24 Stat. 505, (March 3, 1887) had not enlarged the bounds defined in *United States v. Alire*. Neither *Alire* or *Jones* embraced requests for declaratory judgments. ©

To supplement its "money judgment" argument in relation to the contention that the jurisdiction of the Court of Claims is limited to cases involving claims for the "present" recovery of money, petitioner points to other cases (Br. 10) which held that the Court of Claims may not issue mandamus¹⁵, may not determine an equitable claim for money¹⁶, may not remand a case to an administrative agency¹⁷, may not direct specific performance¹⁸ and may not even grant nominal damages¹⁹, citing also *United States v. Sherwood*, 312 U.S. 584 (1941). All of these cases, with the exception of *United States v. Jones, Receiver*, 336 U.S. 641, were decided before the 1948 Judicial Code revision which provided that the Declaratory Judgment Act is applicable to "any court of the United States" and included the United States Court of Claims within the term of a "court of the United States" (28 U.S.C. § 451). 5 of the 9 cases cited by the petitioner were decided before the enactment of the Declaratory Judgment Act in 1934. In *United States v. Jones, Receiver*, *supra*, decided April 18, 1949, while referring to the "money judgment" jurisdiction of the Court of Claims in comparison to district courts, and in noting the provision for judicial review under the Administrative Procedure Act (§ 10, 60 Stat. 243, June 11, 1946, 5 U.S.C. § 701, et seq.) (including declaratory judgments), the Court did not consider, or speak of, the applicability of the Declaratory Judgment Act to the Court of Claims in the light of the 1948 Code revision providing that the Declaratory Judgment Act is applicable to "any court of the United States" (336 U.S. at 671-672). The issue involved in *United States v. Sherwood*, *supra*, was whether the Tucker

¹⁵ *United States v. Alir* *supra* (1867).

¹⁶ *Bonner v. United States*, 76 U.S. (9 Wall.) 156 (1869).

¹⁷ *United States v. Jones, Receiver*, 336 U.S. 641 (1949).

¹⁸ *United States v. Jones*, 131 U.S. 1 (1889).

¹⁹ *Grant v. United States*, 74 U.S. (7 Wall.) 331, 338 (1868); *Marion & Rye Valley Railway Co. v. United States*, 270 U.S. 280 (1926); *Nortz v. United States*, 294 U.S. 317, 327 (1935); *Perry v. United States*, 294 U.S. 330, 355 (1935).

Act waived sovereign immunity in suits by the creditor of a person having a claim against the United States. As petitioner itself acknowledged (Br. 14), the decision in *United States v. Sherwood*, *supra*, turned on the fact that the creditor did not himself have a claim against the United States—"the jurisdictional requisite of the Tucker Act" (Br. 14). The Court noted that the Court of Claims' "jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States [citing *United States v. Alire*, *supra*, and *United States v. Jones*, *supra*] and if relief is sought against other than the United States the suit [is] * * * beyond the jurisdiction of the Court." (312 U.S. at 588). Hence, the issue to which the Court was directed was the jurisdiction over parties other than the United States and not to the question of whether the Declaratory Judgment Act is applicable to the United States Court of Claims or whether the jurisdiction of the Court of Claims is limited to the adjudication of claims involving the "present" recovery of money from the United States. Again, it is to be noted, that the decision in *United States v. Sherwood* was rendered prior to the 1948 revision and codification of the Judicial Code wherein the Declaratory Judgment Act provides that "any court of the United States" may render a declaratory judgment. Moreover, the decision below is not inconsistent with the rationale of *United States v. Sherwood* as petitioner has asserted (Br. 6, 14). The Court did not hold in *United States v. Sherwood*, nor in any of the other cases cited by petitioner, that the Court of Claims' jurisdiction is confined to claims involving the "present" recovery of money from the United States.

In furtherance of its argument that the jurisdiction of the Court of Claims is limited to the "present" recovery of money petitioner cites *Twin Cities Properties, Inc. v. United States*, 81 Ct.Cl. 655 (1935) (which the decision below overruled (A. 23)) which held that the 1934 Declaratory Judgment Act was not applicable founded on the view, as stated in the decision below, "that allowance of declaratory relief would expand the Tucker Act juris-

diction of the court beyond its accepted limits; that "Congress, if it meant to consent to the expansion would have referred to the court by name in the Declaratory Judgment Act"; and "that, since Congress did not, the court has no warrant to assume declaratory power" (A. 23). At the time of the *Twin Cities Properties, Inc. v. United States* decision the Declaratory Judgment Act extended to "the courts of the United States". The decision in *Twin Cities Properties, Inc.* did not cite or discuss any reasons why declaratory relief would have been inappropriate to the Court at that time, disposing of the question in two paragraphs, stating:

"We think the defendant's motion [to dismiss for lack of jurisdiction] should be sustained. In the case of *Pocono Pines Assembly Hotels Co. v. United States*, [73 Ct.Cl. 447, motion to file petition for writ of mandamus and/or prohibition denied, 285 U.S. 526 (1932)], we had occasion to discuss in *extenso* the jurisdiction of this court, and in view of the axiomatic legal principle that the United States may not be sued without its consent, we think it exacts a specific statute according such consent and expressly conferring jurisdiction upon this court before we may proceed. *United States v. Milliken Imprinting Co.*, [202 U.S. 168 (1906)]; *Eastern Transportation Co. v. United States*, [272 U.S. 675 (1927)]; *United States v. Michel*, [282 U.S. 656 (1931)].

"If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdiction from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised." [81 Ct.Cl. at 658.] (A. 22).

In the decision below, however, the Court of Claims furnished definitive insight into the basis upon which it deemed the Declaratory Judgment Act, 28 U.S.C. § 2201 (1948) is applicable to the Court of Claims (A. 34). Spe-

cifically, in this regard, the Court stated: "Because the term 'any court of the United States' in the operative clause of the Declaratory Judgment Act strongly suggests the inclusion of the Court of Claims and because we believe that declaratory relief is consistent with the concept of money-judgment jurisdiction established by *Alire* and *Jones*, that it need not be used to expand our jurisdiction, and that it would not result in the exposure of the sovereign to an alien remedy, we do not require, as the court in *Twin Cities* did, a totally unambiguous Congressional statement vesting us with the authority to grant declaratory relief against the United States." (A. 34)²⁰. Consideration of the factors cited by the Court of Claims as to the precise basis for its decision holding the Declaratory Judgment Act is applicable to the Court of Claims clearly shows that its holding is completely justified and rests on firm footing and that the overruling of the *Twin Cities Properties, Inc.* decision was well founded.

In furtherance of its contention that the jurisdiction of the Court of Claims is limited to claims involving the "present" recovery of money from the United States, the petitioner has asserted that every court of appeals that has considered the question of whether the combined effect

²⁰ In connection with its reference to the *Twin Cities Properties, Inc. v. United States* decision, petitioner cited (Br. 12) *Rolls-Royce Ltd. Derby, England v. United States*, 176 Ct.Cl. 694, 364 F.2d 415 (1966). A reading of the holding in *Rolls-Royce Ltd., Derby, England v. United States* shows that the court did not rule that the Declaratory Judgment Act does not apply to the Court of Claims or that the Court of Claims' jurisdiction is limited to claims involving the "present" recovery of money. The opinion shows (176 Ct.Cl. at 701-702) that the Court of Claims was only concerned with the resolution of a jurisdictional question in connection with a counterclaim between two private parties (i.e. intervenor's counterclaim against plaintiff). There, the Court of Claims held that this portion of the counterclaim went beyond the jurisdiction of the Court since the Court had no jurisdiction over a private party's action for breach of contract against the plaintiff and that it followed that the Court could not circumvent its lack of jurisdiction by granting the private party the relief it sought under the Declaratory Judgment Act.

of the Tucker Act and the Declaratory Judgment Act is to allow the district courts to render declarations of rights against the United States have ruled "that the district court's jurisdiction under the Tucker Act is limited to claims for actual, presently due money damages from the United States and that Congress has not waived immunity to allow declaratory judgments in the absence of such a claim" (Br. 12). In each of the cases cited by petitioner (Br. 12-13) to support its contention the underlying controversy was held to be outside the court's jurisdiction. The actions were to declare wheat quota legislation unconstitutional;²¹ to fix for federal tax purposes the allocation of partnership income;²² to prevent the sale of Government-owned property;²³ to hold the United States for breach by a serviceman of his assignment of retired pay;²⁴ to compel employment in the Government;²⁵ to review agency action where the statute precluded, or was thought to preclude, review;²⁶ to void an assignment of letters patent;²⁷ and to declare the good time allowance of a federal prisoner who had not exhausted his administrative remedies.²⁸ On the basis that there was no jurisdiction

²¹ *Stout v. United States*, 229 F.2d 918 (C.A. 2) (1956), cert. denied, 351 U.S. 982 (1956). Compare with *Teplitsky v. Bureau of Compensation U.S. Department of Labor and United States of America*, *supra*, wherein the Court of Appeals for the 2nd Circuit affirmed, with modification (as to election of compensation benefits available to appellant), a holding of the United States District Court for the Southern District of New York that petitioner here was entitled to bring an action under 28 U.S.C. § 2201 and the petitioner obtained declaratory relief.

²² *Wilson v. Wilson*, 141 F.2d 599 (C.A. 4) (1944).

²³ *Anderson v. United States*, 229 F.2d 675 (C.A. 5) (1956).

²⁴ *United States v. Smith*, 393 F.2d 318 (C.A. 5) (1968).

²⁵ *Love v. United States*, 108 F.2d 43 (C.A. 8) (1939), cert. denied 309 U.S. 673 (1940).

²⁶ *Wells v. United States*, 280 F.2d 275 (C.A. 9) (1960).

²⁷ *Clay v. United States*, 210 F.2d 686 (CA DC) (1953), cert. denied, 347 U.S. 927 (1954).

²⁸ *Gibson v. United States*, 161 F.2d 973 (C.A. 6) (1947).

over the subject matter neither the respondent nor the Court of Claims would reach a different result in these cases. None of the cases cited by petitioner support the petitioner's argument that the jurisdiction of the Court of Claims is limited to claims involving "presently" due money. Similarly, none of these cases held that the Declaratory Judgment Act does not apply to "any court of the United States" and, specifically, to the Court of Claims.

On the basis of the foregoing points and authorities it is urged that the jurisdiction of the United States Court of Claims is not limited to claims against the United States involving money "presently" due from the United States.

IV.

The Decision Below Is Consistent With The Functions Of And Limitations Upon The Jurisdiction Of The Court Of Claims

The decision of the Court of Claims holding that the Declaratory Judgment Act is applicable to that forum is entirely consistent with its historical functions and limitations upon the jurisdiction of the Court of Claims. The petitioner itself has acknowledged (Br. 11) that the Congress in adopting the Declaratory Judgment Act, drew an analogy to the procedures of the Court of Claims, stating that the decisions of the Court of Claims are essentially declaratory in nature (Citing S. Rep. No. 1005, 73d Cong., 2nd Sess. 4-5 (1934)). In consonance with the decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, *supra*, the application of the declaratory procedures provided for in the Declaratory Judgment Act merely enlarges the "range of remedies" available in the Court of Claims and will not "extend [its] jurisdiction" beyond the limits of its jurisdiction as set forth in the Tucker Act as now codified in 28 U.S.C. § 1491. As shown in the decision below the Court of Claims was keenly aware that its "use of the Declaratory Judgment Act need not, and will not, be

used to expand the classes of claims or issues which this Court may consider" (A. 29). As the Court of Claims stated: "The [Declaratory Judgment] Act itself states that a court may adopt the procedure only in cases 'within its jurisdiction' ". (A. 29).

Use of declaratory procedures by the Court of Claims merely represents a "procedural step" in the adjudication of a claim against the United States within the purview of 28 U.S.C. § 1491, that is, with respect to any claim against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" in order to determine whether monies are due or will be due a claimant from the United States. As in this case, in order for the Court of Claims to determine whether the respondent does have a meritorious claim, i.e. a right to collect money from the United States, it is incumbent upon the Court of Claims to determine and to "declare" whether the respondent should have been retired by reason of physical disability and secondly, whether his records should have been corrected to show that he was retired by reason of physical disability in 1959. Entry of a declaratory judgment on these issues in relation to the respondent's claim would not be inconsistent with the Court of Claims' functions or limitation on its jurisdiction. To the contrary, it would be compatible with its practice under Court of Claims Rule 47(c).

Examination of the decision below readily shows there is no basis upon which it can be said that the utilization of declaratory procedures by the Court of Claims will cause it to "hear and declare rights in a variety of situations that have always been thought beyond its power", as petitioner has asserted (Br. 16). This is best shown, as indicated above, by the Court of Claims' unequivocal statement that its "use of the Declaratory Judgment Act

need not, and will not, be used to expand the classes of claims or issues which this Court may consider" (A. 29). Other elements of the decision which serve to negate the petitioner's assertion are the Court of Claims' observations that "a declaratory proceeding could not be used for money-related claims which this court cannot consider"; that claimants "with tort claims against the Government or other causes of action over which we have no power, cannot evade the subject-matter limitations of our jurisdiction by refashioning their actions in the terms of a declaratory proceeding"; that "specific relief otherwise unavailable here (injunction, mandamus, specific performance, prohibition, orders *in rem*) cannot be obtained in violation of the *Alire-Jones* doctrine"; and that a claim which "is not in reality against the Government" cannot "be camouflaged as such in the guise of a declaratory proceeding" (A. 32-33). As the Court of Claims stated: "For a money-related claim against the United States, all that can happen under the Declaratory Judgment Act as applied in this court is that the plaintiff's right, if it is within our competence, will be *recognized* even though no immediate enforcement of it [is] asked". (Citing *Skelly Oil Co. v. Phillips Petroleum Co.*, *supra*, 339 U.S. at 671). Surely, within this frame of reference, it is self-evident that from the decision below there is no justification for it being asserted, concluded or inferred that the Court of Claims has embarked upon a course that will result in it hearing or declaring rights "in a variety of situations" beyond the jurisdiction of the Tucker Act, 28 U.S.C. § 1491.

Petitioner contends that "[i]n practical effect" the Court of Claims "has here asserted the power to grant relief that is equitable in nature" (Br. 17). To support its contention the petitioner states: "It authorized respondent to seek 'a declaration of his right to be retired for disability and to have his military records changed'" (A. 40). Review of the decision below shows that the holding that the provisions of the Declaratory Judgment Act are applicable

to the Court of Claims does not connote an assertion of power on the part of the Court of Claims to grant relief that is equitable in nature. Specifically, the Court of Claims took cognizance of the fact that it is "axiomatic that this court has no direct power to grant specific equitable relief (injunction, mandamus, restraining order and the like) on a claim and cannot have unless Congress grants that power"; that a "declaratory judgment is not a form of specific equitable relief, or strictly speaking, equitable relief"; and that "[a]lthough considerations relevant to the issuance of various forms of equitable relief are also pertinent to the use of the Declaratory Judgment Act" and "the historical origins of declaratory relief are in equity" that "the procedure 'is neither distinctly in law nor in equity, but sui generis'" (Citing S. Rep. No. 1005, 73d Cong., 2nd Sess. 6 (1934)) (A. 25). These observations by the Court of Claims are consistent with the Court's statement in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) that the Declaratory Judgment Act "only provided a new form of procedure for the adjudication of rights in conformity to [established equitable] principles (319 U.S. at 300). In this regard, it would appear that the petitioner has misconstrued the nature or intent of the declaration which the Court of Claims authorized the respondent to seek. As viewed by the respondent, the declaration authorized by the Court is one in which his rights would be declared on the two issues identified by the Court of Claims which have a direct bearing on his claim for disability retired pay, namely, (a) whether "by the capricious action of the Secretary of the Army, he was retired for longevity rather than physical disability" (in 1959) and (b) whether "his records should have been corrected [in 1961] to indicate retirement for [physical disability in 1959]" (A. 39). Such a declaration would be a "mere statement of rights" similar to that now granted under Court of Claims Rule 47 (c) (A. 27) or a *recognition of respondent's rights* (A. 33) as they pertain to his claim for disability retired pay.

Petitioner asserts that a declaration by the Court of Claims "presumably would have a *res judicata* effect as between respondent and the United States" (Br. 17). As the Court of Claims stated in the decision below, both "money judgments and declaratory judgments are both *res judicata* in later suits between the parties" (A. 28). As such, it would be expected that declaratory relief granted by the Court of Claims would have, and should have, such an effect. Most certainly, such an effect would not represent anything in excess of the historical functions of the Court of Claims. Similarly, with respect to the petitioner's view that the granting of declaratory relief "could be the same as the entry of a mandatory injunction" (Br. 17-18) it can readily be seen that the impact of a declaratory judgment would be no more than that traditionally flowing from the entry of a money judgment. As in the case of the award of a money judgment, as described in the decision below, the granting of declaratory relief by the Court of Claims would serve as "authoritative information to officials that their conduct was unlawful and that unless their positions are altered similar judgments may be rendered in the future" (A. 26). However, the declaration, as with money judgments, would merely have a "*volitional reaction* of a responsible government in conforming its conduct to the pronouncements of an authoritative tribunal" (A. 26) (Emphasis supplied). With reference to the petitioner's supposition that the effect of the granting of declaratory relief would be a "remand" to the administrative level, it appears that the petitioner has not taken into account that, as in respondent's case, any administrative corrective action or relief sought subsequent to the rendering of a declaratory judgment, as in the case of a money judgment, would have to be initiated by a plaintiff and not by the agency concerned acting *sua sponte*. This is precisely what was envisioned by the Court of Claims when it addressed itself to the respondent's potential use of his declaration to obtain administrative relief (A. 31).

In connection with the petitioner's endeavor to show "[o]ther enlargements upon the Court of Claims' jurisdiction that result from the decision below" it appears that the Court of Claims had authorized two plaintiff's an opportunity to amend their complaints to seek declaratory relief. In one, *Paulsen v. United States*, Ct.Cl. No. 327-67, the amended petition seeks credit for alleged involuntary sick leave, or, in the alternative, \$636.00 for a specific involuntary leave period. The other case, *Wilkerson v. United States*, Ct.Cl. No. 137-65, involved a claim for a widow's benefits as affected by a discharge alleged to be wrongful.²⁹ The Government in each of the three maritime cases³⁰ petitioner cited—which involve money claims, and include a prayer for declaratory relief (Br. 19), moved for summary judgment on the ground that the cause of action was non-justiciable. If the Government is right, the suits are not saved by the prayer for declaratory relief.

The decision below, as well as the decision in *Sweeney v. United States*, 152 Ct.Cl. 516, 285 F.2d 444 (1961), manifestly demonstrate the Court of Claims' keen and total awareness of the exception provided for in the Declaratory Judgment Act of cases "with respect to Federal taxes" and, accordingly, that there is no foundation for the "concern" expressed by the petitioner in the area of

²⁹ In *Wilkerson*, a judgment was entered for plaintiff in the amount of \$2,916.00 on October 4, 1968 based on a stipulation filed October 1, 1968 wherein the plaintiff agreed to accept \$2,916.00 in full settlement of the claim. Obviously, this was a claim with a "money cast" or was a "money related" claim. The claim for \$636.00 in *Paulsen* and the entry of the money judgment in *Wilkerson* surely negates the petitioner's assertion that *Paulsen* and *Wilkerson* "obviously present circumstances where the Court of Claims could not grant a money judgment, and without the asserted power to issue declaratory relief, would have no jurisdiction". (Br. 20).

³⁰ *American Export Isbrandsten Lines, Inc. v. United States*, Ct.Cl. No. 75-68; *American President Lines, Ltd. v. United States*, Ct.Cl. No. 55-68; *Delta Steamship Lines, Inc. v. United States*, Ct.Cl. No. 74-68.

"federal tax litigation" (Br. 20-21). In the decision below, the Court of Claims identified cases "with respect to Federal taxes" as a "category expressly exempt from the Declaratory Judgment Act" (A. 15). As reflected in the decision below, the attention of the Court was specifically directed to the exception "with respect to Federal taxes" in its rejection of the petitioner's contention that respondent's case fell within the exception and the Court of Claims' holding that the "determination which [respondent] requests is not a determination of his tax liability" (A. 39) and that the interpretation and application" of 26 U.S.C. § 104(a)(4) "(allowing exclusion of allowances for armed-services connected injuries and sicknesses) is totally irrelevant to the question [respondent] seeks to place before us" (A. 39-40).³¹ In *Sweeney v. United States*, *supra*, the plaintiff sought, in pertinent part, to recover federal income taxes alleged to have been erroneously asserted and collected from his deceased father. The Court of Claims held that one of the plaintiff's counts related to a claim for refund of taxes paid on retired pay was barred and, in connection therewith, also held further that it had to be dismissed "on the additional ground that this court has no jurisdiction to grant a declaratory judgment with regard to federal taxes under 28 U.S.C. § 2201" (152 Ct.Cl. at 522). As shown by the decision below, the respondent's "tax motives have absolutely no bearing on the application of the declaratory remedy" (A. 40). This is not a "tax refund case". The respondent is seeking disability retired pay. Here, in the language of the Court of Claims in *Oleson v. United States*, 172 Ct.Cl. 9 (1965), respondent's "judicial claim" is being made be-

³¹ Petitioner has erred in stating that "[r]espondent's retirement pay would be the same regardless of the basis for retirement" (Br. 20). While the "maximum pay rate" (A. 13) or gross amount to which respondent is entitled whether retired for longevity or physical disability is the same (i.e. 75% of his monthly basic pay) there would be an actual difference had he been retired by reason of physical disability (the quantum of which equals the federal taxes withheld on his retired pay for longevity). (A. 12-13).

cause he "was not [and has not been] paid the full amount of [disability] retired pay to which he was [and is] duly entitled [as a matter of right but for the arbitrary and capricious action resulting in his not being retired for physical disability]". (172 Ct.Cl. at 14). As such, it is clear that the subject matter of respondent's case falls within the subject matter jurisdiction of the Court of Claims as defined in the Tucker Act, 28 U.S.C. § 1491, and that it would be appropriate for the Court of Claims to grant the respondent declaratory relief as provided for in the Declaratory Judgment Act.

In the light of the foregoing considerations, it is urged that the decision below is consistent with the historical functions of and limitations upon the jurisdiction of the Court of Claims.

V.

The Decision Below Is Consistent With The Purposes Of The Declaratory Judgment Act

As a "court of the United States" it is consistent with the express purpose of the Declaratory Judgment Act for the Court of Claims "to declare the rights and other legal relations" of both claimants and the United States in cases of "actual controversy" within its jurisdiction including, among other things, cases founded upon the Constitution, any Act of Congress, or any regulation of an executive department. The authority of the Court of Claims to declare the rights of a claimant and/or the United States with respect to an asserted "claim against the United States", whether in the ultimate it is determined a claimant may or may not be entitled to any monies due or that will be due in relation to the claim, is manifestly in accord with the intent of the Declaratory Judgment Act.

At the outset of its argument that the decision below is inconsistent with the purposes of the Declaratory Judgment Act the petitioner states: "As we indicated above, the Declaratory Judgment Act was intended to create 'a

procedure designed to facilitate the settlement of private controversies" (Br. 22). (Citing S. Rep. No. 1240, 74th Congress, 1st Sess. 11 (1935)). It then argues (Br. 22) that the controversy in the respondent's case is "public" rather than "private" (Br. 22). The reference to settlement of "private" controversies was made in connection with the 1935 amendment of the 74th Congress providing for the exception "with respect to Federal taxes" in § 405, Revenue Act of 1935, 49 Stat. 1014, 1027³², and not in connection with the enactment of the Declaratory Judgment Act in 1934 (48 Stat. 955) by the 73rd Congress. In speaking on the very question of the reference to "private" controversies Professor Borchard stated:

"How the Government officials who advised the Senate Finance Committee acquired the idea that the declaratory procedure was designed to facilitate the settlement of 'private' controversies but not 'public' controversies, it is not easy to surmise. There was no justification for such a belief and the Committee was misled. Experience would indicate that the declaratory judgment is used very commonly in England and the United States to challenge the validity of public actions whenever it affects the rights or claims of private individuals or other public bodies". Borchard, *Declaratory Judgments*, at 854, (2d Ed., 1941).

A consideration which clearly negates the petitioner's argument that the provisions of the Declaratory Judgment Act are only applicable to "private" controversies is the fact that declaratory relief has been deemed proper

³² § 405, Revenue Act of 1935, 49 Stat. 1027 stated:

"(a) Paragraph (1) of section 274D of the Judicial Code (Public, Numbered 343, Seventy-Third Congress is amended by adding after the words 'actual controversy' the following: '(except with respect to Federal taxes)'.

(b) The amendment made by subsection (a) of this section shall apply to any proceeding now pending in any court of the United States." (Emphasis supplied).

in comparable federal litigation under the Suits In Admiralty Act,³³ the National Service Life Insurance Act,³⁴ the Trading With The Enemy Act,³⁵ and the Federal Tort Claims Act³⁶. Also, the petitioner's argument appears to be inconsistent with its own actions wherein it has instituted proceedings seeking declaratory relief as in *Teplitzsky v. Bureau of Compensation U. S. Department of Labor and United States of America, supra*, and *United States v. Reynolds Metals Company, supra*. Indicative of a Congressional intent not to exclude the application of the Declaratory Judgment Act to, among other things, all claims against the United States, such as under the Tucker Act, 28 U.S.C. § 1491, may reasonably be inferred or concluded from the very language used in the 1935 amendment providing for an exception "with respect to Federal taxes" only and not with respect to all claims against the United States. That is, had the Congress intended to exclude all claims against the United States the language of the exception in the 1935 amendment may well have stated "with respect to 'claims' [or 'all claims'] against the United States." There is nothing to show that such was intended by the Congress. These considerations clearly show that the decision below is not inconsistent with the purposes of the Declaratory Judgment Act.

As respondent has shown above, his case involves a "claim against the United States" within the purview of 28 U.S.C. § 1491 in that it is founded on Acts of Congress,³⁷ and regulations of an executive department,³⁸ as

³³ *Luckenbach Steamship Co. v. United States, supra*; *American-Foreign Steamship Corp. v. United States, supra*; *American President Lines v. United States, supra*, note 9.

³⁴ *Unger v. United States, supra* note 10.

³⁵ *Brownell v. Ketcham Wire & Mfg Co., supra*, note 11.

³⁶ *Pennsylvania R.R. Co. v. United States, supra*, note 12.

³⁷ 10 U.S.C. § 1201, et seq.; 10 U.S.C. § 1552.

³⁸ Army Regulations 635-40A and 635-40B.

they pertain to his entitlement to disability retired pay. The issues pertinent to the adjudication of respondent's claim, as shown in the amendment to his petition (A. 41-42), involve the questions of whether he should have been retired by reason of physical disability in 1959 and whether his records should have been corrected to show his retirement by reason of physical disability. Contrary to the view expressed by the petitioner, the respondent's "basic complaint" is not against a "government official" (Br. 22) and it is not "an ordinary claim of improper action by a federal official" (Br. 23) whereby he should have brought an action in a district court for judicial relief—to seek a correction of his records. In neither his original petition (A. 3-6) nor in the amendment to the petition (A. 41-42), is respondent seeking a correction of his records. While the adjudication of the respondent's claim, as in any claim brought under the provisions of 28 U.S.C. § 1491, necessitates a judicial inquiry by the Court of Claims into the actions of a cognizant "government" or "federal" officials (such as the Secretary of the Army and/or his designees or administrative forums acting for and on behalf of the Secretary) and the interpretation of Acts of Congress and regulations of an executive department, the money relief that may be accorded the respondent, in the ultimate, is obtainable solely from the United States and not the "federal" or "government" officials.

To resolve the merit of a claim against the United States under 28 U.S.C. § 1491 necessitates the Court of Claims making an initial determination or declaration regarding the actions of cognizant agents of the United States (e.g. the Secretary of the Army or his designees) against the background of governing Acts of Congress and/or regulations of an executive department as to whether such actions caused him to be deprived of money otherwise due or that will be due the claimant. In this regard, it would appear that the following language from *Glidden Co. v. Zdanok*, *supra* (from which petitioner cited the "money judgment" doctrine), lends support to the re-

spondent's contention as to the appropriateness of declaratory judgment procedures being applicable to the Court of Claims:

"The cases heard by the Court [of Claims] have been as intricate and far-ranging as any coming within the federal-question jurisdiction, 28 USC § 1331, of the District Courts. E.g. *Causby v United States*, 104 CtCl 342, 60 F Supp 751, remanded for further findings 328 US 256, 90 L ed 1206, 66 S Ct 1062 (eminent domain); *Lovett v United States* 104 CtCl 557, 66 F Supp 142, affd, 328 US 303, 90 L Ed 1252, 66 S Ct 1073 (bill of attainder); *Shapiro v United States*, 107 CtCl 650, 69 F Supp 205 (military due process). In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.

Indeed, there is reason to believe that the Court of Claims has been constituted as it is precisely to the end that there may be a tribunal specially qualified to hold the Government to strict legal accounting. From the beginning it has been given jurisdiction only to award damages, not specific relief [Citing *United States v Alire, supra* and *United States v Jones, supra*] . . . No question can be raised of Congress' freedom, consistently with Article 3, to impose such a limitation upon the remedial powers of a federal court. *Lauf v E. G. Shinner & Co.*, 303 US 323, 330, 82 L Ed 872, 877, 58 S Ct 578 (Norris-LaGuardia Act). But far from serving as a restriction, this limitation *has allowed the Court of Claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action.*" (370 US at 556-557). (Emphasis supplied).

Within this frame of reference, and especially as a "court of the United States" which the Court has viewed as having a "greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action", the granting of declaratory relief is surely compatible and

consistent with purposes of the Declaratory Judgment Act. By employing the procedural remedy available to the Court of Claims under the Declaratory Judgment Act, the Court of Claims, among other things, will be enhancing the expeditious administration of justice. In this regard, as the Court stated in *Glidden Co. v. Zdanok*, *supra*, in quoting President Lincoln's State of the Union Message in 1861: "It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals". 370 U.S. at 553.

In the light of the foregoing, it is urged that the decision below is patently consistent with the purposes of the Declaratory Judgment Act.

CONCLUSION

For the reasons stated above, it is submitted that the Court should affirm the decision of the United States Court of Claims.

Respectfully submitted.

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